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IN THE

Supreme Court of the United States

October Term, 1967.

No. 945

PHILADELPHIA TRANSPORTATION COMPANY, PHILADELPHIA MARKET STREET SUBWAY-ELEVATED RAILWAY COMPANY, MOTOR REAL ESTATE COMPANY, HILL TOP LAND COMPANY, and TRENTON-PHILADELPHIA COACH COMPANY,

and

JOSEPH N. JANNEY, E. GRIGGS ADAMS, STANLEY E. DANNECKER, W. WRIGHT and ELIZABETH B. HUMPHREYS, THOMAS A. MARSTON, H. MELVIN POWELL, CARL SCHMIEG, and CHARLES F. and JANICE F. TROUTS, *Petitioners,*

v.

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY

and

CITY OF PHILADELPHIA.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

No.

PHILADELPHIA TRANSPORTATION COMPANY, PHILADELPHIA MARKET STREET SUBWAY-ELEVATED RAILWAY COMPANY, MOTOR REAL ESTATE COMPANY, HILL TOP LAND COMPANY, AND TRENTON-PHILADELPHIA COACH COMPANY,

AND

JOSEPH N. JANNEY, E. GRIGGS ADAMS, STANLEY E. DANNECKER, W. WRIGHT AND ELIZABETH B. HUMPHREYS, THOMAS A. MARSTON, H. MELVIN POWELL, CARL SCHMIEG, AND CHARLES F. AND JANICE F. TROUTS,

Petitioners,

v.

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY

AND

CITY OF PHILADELPHIA.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA.

The Philadelphia Transportation Company and its wholly-owned subsidiaries (PTC) and intervening stockholders, Joseph N. Janney, et al., pray that a petition for a writ of certiorari issue to review the final judgments or

decrees of the Supreme Court of Pennsylvania entered July 27, 1967, a timely petition for reargument having been denied on September 26, 1967, which judgments or decrees (1) affirmed the judgment and final decree of the Court of Common Pleas of Philadelphia County and (2) affirmed the subsequent preliminary injunction of the Court of Common Pleas of Philadelphia County restraining petitioners from instituting federal court proceedings.

OPINIONS BELOW.

The opinions of the Supreme Court of Pennsylvania affirming the judgment and final decree of the Philadelphia court are reported at 426 Pa. 377, 233 A. 2d 15 (1967) and are printed as Appendix A in a separate Appendix volume filed herewith. The opinions of the Supreme Court of Pennsylvania affirming the subsequent preliminary injunction of the Philadelphia court are reported at 426 Pa. 418, 233 A.2d 35 (1967) (Appendix B). Previous opinions of the Supreme Court of Pennsylvania on an interlocutory appeal are reported at 419 Pa. 471, 214 A. 2d 632 (1965) (Appendix C). The opinions of the Court of Common Pleas of Philadelphia County are unreported. The opinion and decree nisi of the trial judge (Spaeth, J.) filed July 14, 1966, are printed as Appendix D. The opinion and final decree of the Court of Common Pleas *en banc* filed September 16, 1966, are printed as Appendix E. The opinion and preliminary injunction of the trial judge filed January 6, 1967, are printed as Appendix F.

JURISDICTION.

The final judgments or decrees of the Supreme Court of Pennsylvania sought to be reviewed were entered July 27, 1967, and timely petitions for rehearing therefrom were denied September 26, 1967. The jurisdiction of this Court to review the final judgments or decrees of the Supreme Court of Pennsylvania is invoked under Section 1257(3) of the Judicial Code of the United States (28 U. S. C. § 1257[3]).

QUESTIONS PRESENTED.

In a declaratory judgment proceeding brought by Southeastern Pennsylvania Transportation Authority (SEPTA), an agency of the Commonwealth of Pennsylvania, and the City of Philadelphia, against Philadelphia Transportation Company (PTC), a privately-owned public utility which operates and in large part owns the mass transportation system in Philadelphia, the Supreme Court of Pennsylvania, by a 4-3 decision with the Chief Justice and two of his associate justices dissenting, affirmed the final decree of a Philadelphia state court authorizing SEPTA to take over PTC's property for public use upon payment of a purchase price which, after deducting extraordinary financial obligations imposed upon PTC, would leave PTC and its 14,000 stockholders (residing throughout the United States) a maximum of $4,550,000 for their book value equity of $29,000,000 and their fair value equity of $123,000,000, in a company with annual after-tax earnings of approximately $3,000,000. The Supreme Court of Pennsylvania, which did not discuss in its opinion the constitutional issues, also affirmed, by a 4-3 decision, an injunction of the lower court restraining

petitioners from seeking an adjudication of their federal constitutional rights in a federal district court.

The following questions are presented:

1. May a state court, in direct conflict with the decision of this Court in *Donovan v. Dallas*, 377 U. S. 408 (1964), ignore the holding of this Court in that case "that state courts are completely without power to restrain federal-court proceedings in *in personam* actions like the one here," by enjoining parties in an *in personam* declaratory judgment action in a state court from establishing their federal constitutional rights in a federal district court?

2. Does not a state deprive a regulated privately-owned public utility corporation and its stockholders of their property without just compensation and due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States, by retroactively denying to it a fair and just rate of return on its capital investment, when a state court or other state agency requires the public utility to bear the expenses of future pension payments to its then retired employees (approximately $17,000,000) and, at the same time, takes the company's "fare box" asset or future income, where the company's rates are fixed by the state public utility commission, pursuant to state law, on the basis of treating pension payments to retired employees as current operating expenses in the year of payment with no provision having been made in rates for past years to fund such future payments?

3. Where a state agency seeks to acquire the property of a private corporation by exercising a perpetual purchase option assigned to it by a city which would result in a confiscatory purchase price (having no reasonable relationship to the value of the property taken) based upon an option

price formula exacted by the city in 1939 as a condition of the city's consent to the company's bankruptcy reorganization and the asset values of the property to be acquired are not the product of the grant of any franchise, privilege or right, shall the state be permitted, under the constitutional view of the Fourteenth Amendment today, to impose and enforce such an unconstitutional condition which will deprive the corporation and its stockholders of their property without due process of law?

4. Where a state agency, in concert of action with a city and pursuant to the authorization and decree of the state courts, seeks to circumvent a requirement of the statute under which it was created (that fair value be paid for property acquired by it whether in condemnation or through negotiation) by procuring from the city, without consideration, an assignment of the city's existing right to purchase all the assets of a privately-owned transportation company and exercises this option at a price which, as determined by the state courts, is grossly unfair and confiscatory, is not this, under the guise of exercising and interpreting a purchase option contract, in reality a condemnation or taking of private property for public use without just compensation and does not the state thereby deprive the corporation and its stockholders of their property without due process of law in violation of their constitutional rights under the Fourteenth Amendment to the Constitution of the United States, particularly under the following circumstances?

(a) All consideration of actual fair value of the property was excluded by the state courts, which rejected evidence that actual fair value exceeded book value by $94,000,000 even for the purpose of determining the reasonableness of their construction of the option phrase "the then undistributed corporate sur-

plus", thus restricting the price formula to book values based on historic costs (recorded under prescribed public utility accounting procedures) having no relation to present-day values.

(b) The phrase "the then undistributed corporate surplus" is further limited, by an untenable construction having no basis in state law, to "retained earnings", thus excluding, in addition to revaluation surplus reflecting appreciation, all other "capital surplus". This excluded from the purchase price "capital surplus" representing a book transfer of $5,000,000 from the capital stock to the capital surplus account resulting from a reclassification in 1955 of preferred stock with an aggregate par value which exceeded by that amount the stated value of the common stock into which it had been reclassified. There had been no distribution to stockholders or any change in book value. The full par value of the preferred stock (including the $5,000,000) was indisputably a part of the formula price prior to its reclassification.

(c) There is imposed upon the transportation company, whose properties were being taken over at the formula price, responsibility for the payment of all current liabilities, as well as the pension obligations referred to in Question 2, although the meaning of "surplus" (a factor in the option formula determining purchase price) was established by this Court in *Edwards v. Douglas,* 269 U. S. 204, 214 (1925), and by the Pennsylvania Supreme Court in *Branch v. Kaiser,* 291 Pa. 543, 549, 140 Atl. 498 (1928), and in statutes and accounting authorities of the time, to be "net assets of a corporation in excess of all liabilities including its capital stock." Thus, the company is forced to bear those liabilities twice.

(d) The state courts explicitly refused to consider accounting testimony as to the meaning of the term "undistributed corporate surplus" in its relationship to balance sheet terms and as to the proper accounting treatment of pensions.

(e) In the assignment of the purchase option by the city to another state agency the right specifically retained by the corporation to become a bidder for the right to purchase its property was ignored by the city, the state agency and the state courts preventing the company from protecting itself against what has become a confiscatory purchase price, notwithstanding the express reservation of its contractual right to do so. Moreover, a specific agreement made by the state agency and the corporation after the beginning of the action and with awareness of all the facts to extend the purchase payment date to January 1, 1967, if such purchase should eventuate, was changed by the state courts to a "reasonable" time "not less than six months" after final judgment.

5. Does not Pennsylvania's Metropolitan Transportation Authorities Act of 1963 violate the constitutional rights of a private corporation and its stockholders to just compensation and due process under the Fourteenth Amendment to the Constitution of the United States in that the statute, as construed and applied by the state courts, permits the acquisition by a state agency of the corporation's assets without regard to the fair value thereof and imposes upon the corporation the obligation of paying the pensions of retired employees not previously funded under prior state law?

6. Do not the facts and circumstances set forth in Questions 2, 4 and 5 constitute a violation by a state of the constitutional rights of a corporation and its stockholders

under the obligation of contract guarantees of Article I, Section 10 of the Constitution of the United States?

7. Does not the due process clause in the Fourteenth Amendment to the Constitution of the United States prohibit state agencies, in concert of action, from dealing unfairly with a private corporation to procure an agreement through which its property may be taken without just compensation?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The Fourteenth Amendment to the Constitution of the United States provides in relevant part:

> ". . . nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article I, Section 10 of the Constitution provides in relevant part:

> "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . ."

Article III, Section 2 of the Constitution of the United States provides in relevant part:

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority. . . ."

Article VI of the Constitution of the United States provides in relevant part:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme law of the Land and the Judges

in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

". . . the Members of the several State Legislatures, and all executive and judicial Officers . . . of the several States, shall be bound by Oath or Affirmation, to support this Constitution . . ."

Section 1331(a) of the Judicial Code, 28 U. S. C. § 1331 (a), provides:

"The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

The Constitutional provision and statutes of the Commonwealth of Pennsylvania which are directly involved herein are reported and cited as follows, by volume and page number of the official edition of the Pennsylvania statutes, and their pertinent verbatim text is set forth as indicated in the Appendix hereto:

Metropolitan Transportation Authorities Act of 1963, Act of August 14, 1963, P. L. 894, §§ 1-43, 66 P. S. §§ 2001-2043 (Appendix G);

Pennsylvania Constitution, Art. 17, § 9 (Appendix H);

Act of April 15, 1907, P. L. 80, § 1, 67 P. S. § 1256 (Appendix I);

Act of May 5, 1933, P. L. 364, Art. VII, § 701 (Appendix J);

Act of May 28, 1937, P. L. 1053, Art. III, § 301, as amended, 66 P. S. § 1141 (Appendix K);

Act of July 11, 1957, P. L. 711, § 703, 15 P. S. 2852-2-703 (Appendix L);

STATEMENT.

Southeastern Pennsylvania Transportation Authority (SEPTA) is a public authority organized pursuant to the Metropolitan Transportation Authorities Act of 1963 (SEPTA Act) of the Commonwealth of Pennsylvania (Appendix G) to provide and operate a regional mass transportation system in the City and County of Philadelphia and four adjoining counties. PTC is a privately-owned public utility corporation which presently operates and, in large part, owns the mass transportation system in Philadelphia. Janney *et al.* are stockholders who intervened in the state court proceeding.

In 1907, the City and Philadelphia Rapid Transit Company (PRT), PTC's predecessor, entered into a working agreement in which the City, in Section Eleventh thereof, reserved the right to purchase all the Company's assets, subject to all indebtedness, on July 1, 1957, or on any subsequent July 1, upon six (6) months' notice, for an amount equal to the par value of the then outstanding capital stock of PRT plus that of any additional capital stock issued with the City's consent (Appendix M).

In 1938, the Pennsylvania Public Utility Commission approved a Plan of Reorganization of PRT (to be renamed the Philadelphia Transportation Company (PTC)). Under the Plan of Reorganization, the preferred and common stock was converted into new shares with a sharp reduction in the par and stated values. This resulted in a tremendous loss to the stockholders and the Public Utility Commission expressly stated that it wished to benefit the stockholders by providing for a substantial capital surplus.

In order to consummate this Plan of Reorganization it was necessary to obtain the consent of the City to an amendment of the 1907 Agreement. The City's purchase option in Section Eleventh was amended in 1939 to read as follows:

"ELEVENTH: The City reserves the right to purchase all the property, leaseholds and franchises of the Company and its wholly-owned subsidiaries upon any first day of July hereafter, by serving six months' notice on the Company of its intention so to do and upon paying to the Company upon the date named in said notice, **an amount equal to the sum of the face amount, or call price if any, and accrued interest of all then outstanding bonds** of, and all then outstanding prior lien bonds, mortgages and ground rents on the property of, Company and its wholly-owned subsidiaries, plus the par value of all then outstanding preferred stock of Company, and **an amount equal to ten (10) dollars per share for all then outstanding common stock of Company, and the amount of the then undistributed corporate surplus, if any, of Company.** The City's aforesaid right to purchase shall cover the entire transportation system and property, leaseholds and franchises of the Company and its wholly-owned subsidiaries, as a whole, at the time the City exercises said right to purchase and said option to purchase is in lieu of all existing options which the City now has in any form, whether applicable to the whole system or parts thereof or interest therein: PROVIDED, HOWEVER, That the City reserves to itself whatever right to condemn it now has or shall hereafter have under any present or future legislation giving the City the right to condemn. This contract shall continue in force until such right is exercised, but whenever the right is exercised, the City shall succeed to and become the owner of all the franchises, leaseholds (including all leaseholds from the City to the Company), rights, property and privileges theretofore vested in the Company and its wholly-owned subsidiaries and the City may either

operate the same or lease the right to operate the same for such terms and upon such conditions as it may deem fit. The right of the City to purchase under this paragraph shall be assignable and may be put up at public auction to the highest bidder therefor. The Company reserves its franchise to be a corporation with the power to operate passenger transportation systems and may become a bidder for such right." (Emphasis supplied.)

As construed by the courts below, the 1939 amendment effected five major changes in the City's purchase option: (1) the City could purchase all the assets of the entire transportation system including what had theretofore been the valuable rights of underlying franchisees, (2) the City could now purchase all of PTC's assets free of all liabilities, (3) the City could exercise its option on any July 1 in perpetuity, not merely on July 1, 1957, and any July 1 thereafter, (4) the price was not dependent as under the 1907 Agreement on par value of the capital stock, but on four factors, including the par value of all outstanding preferred stock, $10 for each share of common stock and PTC's "then undistributed corporate surplus, if any", and (5) the City explicitly reserved its right to acquire petitioner's assets by condemnation.

In order to understand the operation of the option-price formula as amended by the 1939 Agreement, it should be noted that the factor of "the par value of all then outstanding preferred stock" of PTC, was eliminated by the complete reclassification in 1955, pursuant to PUC order, of PTC's preferred stock into common stock with a stated value of $10 per share. Because the par value of the preferred stock had been $5,000,000 in excess of the stated value of the common stock into which it was reclassi-

fied, this balance of $5,000,000 was transferred on PTC's books from capital stock to capital surplus. There was no distribution or change in the book value (Appendix N).

Also necessary to an understanding of the issues involved are the facts concerning PTC's pension obligations to those of its employees who would be retired as of the date of the exercise of the option. Before the trial court the parties stipulated that, as of December 31, 1965, the amount required to fund future payments to PTC's retired employees would approximate $17,000,000. Such payments by PTC have been consistently treated for rate-making purposes, as required under state public utilities law, by the Pennsylvania Public Utility Commission, as a current operating expense in the year of payment and no provision was made in rates for funding this obligation in any way. Not only did the PUC approve this treatment of pension obligations but the City Controller, who had the public duty to report on PTC's financial condition, never suggested that pension obligations should be charged against capital rather than against current income for the year of payment, until shortly before the option was exercised.

Section 4(d)(5) of the SEPTA Act (66 P. S. § 2004 (d)(5)) gave SEPTA authority to acquire property, as needed for its statutory purpose, by negotiated purchase, subject, however, to the restrictions of § 8(f)(24)(.1)(iii) (66 P. S. § 2008(f)(.1)(iii)) which governed SEPTA's power of condemnation. This latter section required SEPTA to pay "fair market value" for all property acquired with "due consideration" to be given any legal liability under any pension or retirement plan of any acquired businesses and also to assume the liability of such plans (Appendix G, pp. 238a, 264-5a).

Rather than comply with these provisions of Pennsylvania law (reflecting, as they do, requirements under the

state and federal constitutions) SEPTA and the City acted together to avoid the statutory requirement of fair market value by the City's assignment of the purchase option to SEPTA.*

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* The circumstances of the assignment were characterized by secrecy and unfairness. At the end of 1964 PTC and SEPTA were engaged in discussions relating to a negotiated purchase, which the City knew of and considered to be a problem to be worked out solely by PTC and SEPTA. (See letter of November 2, 1964 from a PTC director (John McShain) to the Mayor of Philadelphia (James H. J. Tate [Appendix O]). At the same time the City and PTC were engaged in discussions relating to extending the Broad Street Subway lease and to continuing license payments at the $560,000 annual rate provided for in the 1962 amendment to the 1907 Agreement. PTC agreed in December, 1964 to a six months' extension.

Because of the need for approval of City Council, the City was not ready to proceed to the actual execution of the six-month extension agreement until the beginning of February, 1965, and on February 2 the City sent PTC an unsigned draft of the agreement, the effective dates of which were January 1, 1965 through June 30, 1965. PTC signed the agreement on February 3 and sent it back to the City for execution. At that time the Mayor was away from the City on a winter vacation until February 25.

In the meantime, PTC and SEPTA had been unable to agree on a purchase price for PTC's assets. On February 17, 1965 in a private meeting between representatives of SEPTA and the City SEPTA requested the City to assign to it, without consideration, the City's purchase-option rights under the 1907 Agreement, as extended by the 1965 six-month Agreement, which had not yet been executed by the City. The City agreed, as requested, to assign its purchase option rights to SEPTA as soon as the execution of the 1965 Agreement was completed. No written record was made of this oral agreement of February 17, and both the City and SEPTA proceeded without disclosure to PTC; PTC never did in fact acquire knowledge of the plan until after the 1965 agreement had been fully executed.

On February 25, 1965, the same day Mayor Tate signed the 1965 Agreement, the City filed in the Office of the Clerk of City Council a proposed ordinance of which PTC had no prior knowledge, to authorize the City to assign to SEPTA, without payment of any consideration, the City's right to purchase the assets of PTC. The ordinance was passed by City Council and was signed by the Mayor on June 4, 1965. On June 8, 1965, the City executed a written assignment to SEPTA without consideration of the City's right to purchase PTC under the 1907 Agreement as amended.

On June 18, 1965, SEPTA, in combination with the City, commenced this declaratory judgment action in the Court of Common Pleas for Philadelphia County against PTC to enforce SEPTA's right to acquire PTC's assets under the City's purchase option.

PTC's objections to the Court's jurisdiction were overruled by Judge Spaeth of that court and his order was affirmed on an interlocutory appeal by the Pennsylvania Supreme Court, Chief Justice Bell dissenting. (*Southeastern Pennsylvania Transp. Authority v. Philadelphia Transp. Co.*, 419 Pa. 471, 214 A. 2d 632 (1965) [Appendix C]).

Settlement discussions were renewed and resulted in an agreement which was rejected by PTC's stockholders. The only portion of that agreement which survived the rejection was a provision that the date of purchase was extended to January 1, 1967 (Appendix p. 174-5a). Judge Spaeth, stating that he was compelled to conclude the case by July 15, 1966, held hearings from May 16 through June 3, 1966, which produced a trial transcript of over 2400 pages and over 80 exhibits, with an additional 500 pages. Judge Spaeth required the parties to submit their requests for findings of fact and conclusions of law, briefs, and argument by June 28, 1966. He heard oral argument on that date and on July 14, 1966, 16 days later, he rendered his Opinion, Findings of Fact, Conclusions of Law and Decree Nisi of over 157 pages, prefaced by a short "Abstract of the Case" intended for public consumption (Appendix pp. 45-190a).

Over 20 pages of Judge Spaeth's opinion on the final decree are spent in describing the evils of private ownership of public transportation facilities in the City of Philadelphia prior to the 1939 Agreement (Appendix pp. 54-79a). This history does not touch upon PTC's development of such facilities since 1939. At the trial of

the action Judge Spaeth refused to accept any proof as to the actual value of PTC's assets in determining the application of the term "undistributed corporate surplus" (Appendix p. 146a). He found instead that the phrase "undistributed corporate surplus" should be construed to refer only to undistributed but normally distributable earned surplus, or "retained earnings" as stated in the books and balance sheets of PTC. He thus eliminated from the price formula approximately five million dollars of capital surplus resulting from reclassification of preferred stock into common stock (see pp. 12-13, *supra*), as well as "revaluation surplus" which might result from stating PTC's assets at their fair market value instead of book value. Worse, he concluded that SEPTA took the assets free of all liabilities, including the obligation to make pension payments in the future to PTC's retired employees. He held that the trial testimony as to accounting terms and methods was irrelevant in interpreting and applying the terms of the purchase price formula in the 1907 and 1939 Agreements, although he reduced the term "undistributed corporate surplus" to the balance sheet item of "Retained Earnings" (Appendix pp. 145-63a). Finally, he held that the date of purchase could be indefinitely postponed, at SEPTA's option, from the agreed date of January 1, 1967, to at least six months after the action is concluded without the possibility of any further appeal (Appendix pp. 174-76a).

The effect of Judge Spaeth's decision is that SEPTA may acquire all of the assets of petitioners, of which petitioners attempted to prove the physical properties alone had a fair value of from $162,000,000 to $171,000,000 after depreciation, for a net payment to PTC's stockholders of $4,547,207 for their total investment. This latter figure is derived from the December 31, 1965, balance sheet figures

which would indicate a price, according to the courts' construction of Section Eleventh, of $51,656,860. The secured debt of PTC, however, which is included in the option price formula, was estimated to be $27,628,332 (Ex. P-36), other obligations of PTC imposed by the Court on PTC total $17,504,377 (Ex. D-44) and the estimated cost of funding future pension payments is approximately $16,911,696 (Ex. D-44). These obligations of PTC exceed the purchase price by $10,387,185 but Judge Spaeth indicated he would permit PTC to discharge current liabilities out of current assets, including cash and perhaps marketable securities (Appendix p. 171a). Thus, using 1965 balance sheet figures, PTC's sole assets would be reduced upon the forced sale to SEPTA to a maximum of $4,547,207. PTC's after-tax earnings in 1965 were $2,949,533 (Ex. D-44).

Subsequently, on January 6, 1967, Judge Spaeth rendered an opinion (Appendix F) and a "preliminary injunction" which enjoined petitioners and all other defendants from, *inter alia:*

> "filing, or inducing others to file, in any State or Federal Court, any lawsuit that will in any way affect the jurisdiction of this Court, the appellate jurisdiction of the Supreme Court of Pennsylvania, or the subject matter of this litigation, other than taking any action in the Supreme Court of Pennsylvania to review any action or decision of this Court . . ." (Appendix p. 231a)

The Pennsylvania Supreme Court affirmed by an identical four-to-three vote (Chief Justice Bell and Justices O'Brien and Roberts dissenting) both the declaratory judgment and the preliminary injunction. The opinion of the Court concerning the declaratory judgment was "merely a

highlighting'' of Judge Spaeth's opinion and, like his, ignored petitioners' constitutional claims (426 Pa. 377, 382, 410, 233 A. 2d 15, 18, 31 [1967]).

The federal constitutional questions raised in this Petition were timely and properly raised by petitioners. They were first raised in requests for findings of fact and conclusions of law made to Judge Spaeth (See Appendix P, pp. 311-13a), and argument was made in support of those requests. Petitioners filed exceptions to his failure to adopt those findings and conclusions (See Appendix P, p. 312-13a) and fully argued the federal questions in their brief and orally before the Court of Common Pleas *en banc* (Appendix R, p. 322a-35a). The exceptions were dismissed by the Court of Common Pleas *en banc* (Appendix E). These constitutional questions were among the ''Questions Presented'' to the Pennsylvania Supreme Court and were fully argued both in petitioners' briefs and in oral argument before that Court (Appendix S). In the case of the preliminary injunction, PTC contended before the injunction was issued that the state court had no power to issue such an order under this Court's decision in *Donovan v. Dallas,* 377 U.S. 408 (1964). Judge Spaeth considered this decision but issued the injunction in spite of it (Appendix F, p. 225a-26a). This question was also raised in PTC's brief before the Pennsylvania Supreme Court (Appendix Q, pp. 316-321a). The Supreme Court of Pennsylvania rejected these contentions. The constitutional questions were renewed in petitioners' petitions for reargument which the Pennsylvania Supreme Court denied. The foregoing matter is discussed more fully in Appendix P, pp. 311-15a.

REASONS FOR GRANTING THE WRIT.

A. The Order Enjoining a Federal Suit Is In Direct Conflict With a Decision of This Court.

In direct conflict with and disregarding the decision of this Court in *Donovan v. Dallas,* 377 U.S. 408 (1964), that state courts have no power to enjoin federal court proceedings, the Supreme Court of Pennsylvania affirmed without comment, by a 4-3 vote, a "preliminary injunction" of the lower state court restraining petitioners from litigating their federal constitutional rights in a federal district court. Judge Spaeth issued the "preliminary injunction" in the purported belief that it was distinguishable from the final injunction in *Donovan* which was issued after the state court appellate process had been completed.*

In fact, however, this case is completely governed by *Donovan.* There this Court reversed an injunction barring

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* The judgment or decree of the Supreme Court of Pennsylvania affirming the preliminary injunction is a "final judgment or decree" within the meaning of § 1257 of the Judicial Code. A state court may not avoid immediate review of an invalid injunction by terming it "preliminary", e.g., *Richfield Oil Corp. v. State Bd. of Equalization,* 329 U. S. 69 (1946), and the question of "finality" under § 1257 is, of course, one of federal law which may not be distorted by state court procedures. *Pope v. Atlantic Coast Line R. Co.,* 345 U. S. 379 (1953). In *Local 438, Constr. & Laborers' Union v. Curry,* 371 U. S. 542 (1963), this Court held that where a state court granted a preliminary injunction which was totally beyond the court's power under federal law, the determination of that question was immediately reviewable by this Court, particularly when to postpone review "would seriously erode" the jurisdiction of a federal agency as an independent forum, not subject to the processes of state courts and state law (371 U. S. at 550). Here, as in *Curry,* there are very important reasons for immediate review of this question. It would be a temptation to any state court to grant a preliminary injunction against a federal court action if this Court held that by doing so the state court would defeat federal jurisdiction through the otherwise valuable policies embodied in the rules of *res judicata.*

plaintiffs and others in an action in the Texas courts from prosecuting a subsequent action in a federal court concerning the right of the City of Dallas to build an additional airport runway and from issuing and selling municipal bonds for that purpose. In *Donovan* the Texas Supreme Court ordered that the plaintiffs in the state court be enjoined from prosecuting a separate, subsequent federal court action and the state court held them in contempt both for attempting to prosecute the existing suit and for instituting a new suit in the federal court to enjoin enforcement of the state court order. This Court reversed the contempt conviction, holding that in the case of *in personam* actions state courts have no power to enjoin federal court proceedings. This ruling therefore clearly applies to both existing proceedings and to those brought after issuance of the state court order.

The preliminary injunction has deprived petitioners of due process by denying them their right of timely access to a federal court.*

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* This right of access to a federal court is based on fundamental constitutional principles which prohibit state courts from enjoining a party from resorting to the federal courts. Article VI of the Constitution of the United States binds judges of every state to recognize the supremacy of the Constitution of the United States and the laws enacted by Congress under the Constitution. Article III, Section 2, provides that the judicial power of the United States shall extend to all cases in law and equity arising under the Constitution and the laws of the United States. Congress has given the United States District Courts "original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States." 28 U. S. C. § 1331. This grant of power creates a federal right in every citizen to invoke that power.

As the Supreme Court said in *Donovan*, the right to pursue "federal-court remedies" is a right "granted by Congress and cannot be taken away by the State," and state courts are "without power to take way this federal right by contempt proceedings or otherwise." *Donovan v. City of Dallas*, 377 U. S. 408, 413-414 (1964). The right to invoke federal court remedies is a right protected by the United

The relief to be granted. The priority in time of the state court judgment over any judgment which petitioners may now obtain in a federal court is the fruit of an unconstitutional denial to petitioners of their right to timely access to the federal courts. To permit that judgment to bar proceedings in a federal district court on the basis of *res judicata* would totally defeat petitioners' constitutional rights.

The denial of petitioners' right to timely access to the federal district court during the pendency of the state court action therefore makes necessary some action by this Court beyond reversal of the lower court's injunction. It is suggested that this Court may grant certiorari as to the injunction while deferring any action on this Petition as to the other points raised pending further developments in the federal court suit now pending in the Eastern District of Pennsylvania.* Petitioners will then have an opportunity to establish their federal rights in the United States District Court. The opinions of the judges in the lower federal courts based on a proper record will be of substantial assistance in determining the merits of petitioners' federal claims.

States Constitution. *Terral v. Burke Construction Co.*, 257 U. S. 529, 532 (1922); *Railway Co. v. Whitton's Administrator*, 13 Wall. 270, 286-287 (1871). In *Garrity v. New Jersey*, 385 U. S. 493 (1967), the Supreme Court characterized this right as one of those "rights of constitutional stature whose exercise a State may not condition by the exaction of a price." 385 U. S. at 500.

* On December 15, 1967, after the denial by the Pennsylvania Supreme Court on September 26, 1967 of the petitions for reargument of its affirmance of the trial court's decrees, PTC commenced an action against SEPTA and the City in the United States District Court for the Eastern District of Pennsylvania (Civil Action No. 44348) seeking a declaratory judgment under the Federal Declaratory Judgment Act adjudicating PTC's constitutional claims.

As to any suggestion of mootness, see *Liner v. Jafco, Inc.*, 375 U. S. 301 (1964). This Court should also note that the majority of the Pennsylvania Supreme Court rejected the dissenters' view that the injunction is moot. (Appendix B, p. 41a.)

B. The Pension Obligation Imposed Here by a State Upon a Public Utility Being Divested of Its Revenue-Producing Assets Retroactively Deprives It of a Fair Rate of Return on Its Investment and Raises a Constitutional Issue of Public Importance.

The imposition on PTC by the state courts of the responsibility for making future pension payments to presently retired employees produces a retroactive deprivation of a fair rate of return on PTC's investment.* By reason of its separation from the operating transportation system and its revenues, PTC no longer has the current income from those revenues, i.e., the "fare box", to use for the payment of those pensions. As stated by Mr. Justice Roberts of the Pennsylvania Supreme Court in his dissenting opinion:

> "The Court's treatment of the $17,000,000 pension obligation . . . retroactively compels PTC to utilize past earnings in order to pay for future obligations."

The courts, public utility commissions and state legislatures have consistently required that pension obligations be treated as current operating expenses in the years of

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* The right of PTC to a fair rate of return is well established.

> "'. . . [T]he action of the state officials in the totality of its consequences "must be" consistent with the enjoyment by the regulated utility of a revenue something higher than the line of confiscation.'" *United Gas Pub. Serv. Co. v. Texas*, 303 U. S. 123, 143 (1938), quoting from *West Ohio Gas Co. v. Public Util. Comm.*, 294 U. S. 63, 70 (1935).

This right cannot be defeated by indirect means. A judicial or quasi-judicial proceeding of a governmental court or agency may not collaterally and retroactively redetermine the reasonableness of rates and charges already established by legislative ruling, *Arizona Grocery Co. v. Atchison, T. & S. F. Ry. Co.*, 284 U. S. 370 (1932), or by default in such ruling, *Forbes Pioneer Boat Line v. Bd. of Comm'rs.*, 258 U. S. 338 (1922).

payment and hence included in the rates for those years.* PTC's rates were fixed on that basis. They contain no ele-

* *Pittsburgh v. Pa. P. U. C.*, 370 Pa. 305, 88 A. 2d 59 (1952); *PUR Digest, Expenses* § 49; *Alabama P. S. C. v. Southern Bell Teleph. Co.* 253 Ala. 1, 36-9, 42 So. 2d 655, 686-9, 84 PUR (NS) 221, 260-4 (1949); *Pacific Tel. & Tel. Co. v. Cal. P. U. C.*, 62 Cal. 2d 634, 401 P. 2d 353, 58 PUR 3d 229, 254 (1965); *Southern Bell Teleph. Co. v. P. S. C.*, 203 Ga. 832, 874-5, 49 S. E. 2d 38, 64, 75 PUR (NS) 471, 503-4 (1948); *Central Maine Power Co. v. Maine P. U. C.*, 150 Me. 257, 109 A. 2d 512, 7 PUR 3d 1 (1954); *New England Teleph. & Teleg. Co. v. Mass. Dept.*, 331 Mass. 604, 121 N. E. 2d 896, 6 PUR 3d 65 (1954); *State v. Tri-State Teleph. & Teleg. Co.*, 204 Minn. 516, 284 N. W. 294, 28 PUR (NS) 158 (1939); *Nevada P. S. C. v. Ely Lt. & Power Co.*, 393 P. 2d 305, 55 PUR 3d 123 (1964); *New Jersey Bell Teleph. Co. v. Bd. of P. U. Comm'rs*, 12 N. J. 568, 97 A. 2d 602, 100 PUR (NS) 379 (1953); *Columbus v. P. U. C.*, 154 Ohio 107, 134, 93 N. E. 2d 693, 707 (1950); In re *Northwestern Bell Tel.*, 73 S. D. 370, 391-2, 43 N. W. 2d 553, 564, 85 PUR (NS) 368, 384-5 (1950), cert. den. sub nom. *Farmers' United Educ. & Coop. v. Northwestern Bell Teleph. Co.*, 340 U. S. 934 (1951); *Southern Bell Teleph. Co. v. Tenn. RR & P. U. C.*, 74 PUR (NS) 150 (Tenn. 1948); *Norfolk v. Chesapeake & P. Tel. Co.*, 192 Va. 292, 64 S. E. 2d 772, 89 PUR (NS) 33 (1951); In re *Petition of New England Teleph. & Tel. Co.*, 116 Vt. 480, 488-9, 80 A. 2d 671, 677-83, 90 PUR (NS) 414, 420-8 (1951); *State ex rel. Pacific Tel. v. Dept. P. S.*, 19 Wash. 2d 200, 252-9, 142 P. 2d 498, 523-7, 52 PUR (NS) 6, 42-8 (1943); *Chesapeake & P. Teleph. Co. v. P. U. C.*, 62 Wash. Law Rep. 486 (Sup. Ct. D. C.); Re *Mississippi River Fuel Corp.*, 63 PUR (NS) 89 (F. P. C. 1945); Re *Western U. Teleg. Co.*, 25 PUR 3d 385 (FCC 1958); Re *Southwestern Bell Teleph. Co.*, 87 PUR (NS) 97 (Ark. 1951); Re *Southwestern Bell Teleph. Co.*, 93 PUR (NS) 161 (Kan. 1952); *Ex parte Southern Bell Teleph.*, 79 PUR (NS) 33 (La. 1949); Re *Chesapeake & P. Teleph. Co.*, 70 PUR (NS) 97 (Md. 1947); Re *Michigan Bell Teleph. Co.*, 85 PUR (NS) 327, 335 (Mich. 1950); Re *Southwestern Bell Teleph. Co.*, 77 PUR (NS) 33, 44 (Mo. 1949); Re *Great Falls Gas Co.*, 29 PUR 3d 237 (Mont. 1959); Re *New England Teleph. & Teleg. Co.*, 30 NHPSCR 266 (N. H. 1948); In Re *Uniform System of Accounts*, 82 PUR (NS) 161 (N. Y. 1950); Re *Norfolk & Carolina Tel. Co.*, 8 PUR 3d 65 (N. C. 1955); In Re *Puerto Rico Teleph. Co.*, 55 PUR 3d 1 (P. R. 1964); Re *New England Teleph. & Teleg. Co.*, 83 PUR (NS) 161, 187 (R. I. 1949); Re *Wisconsin Teleph. Co.*, 80 PUR (NS) 482 (Wisc. 1949); Re *Mountain States Teleph. Co.*, 14 PUR 3d 230 (Wyo. 1956). The Pennsylvania Public Utility Commission, and the City until 1964, have uniformly so considered them. Thus there was no suggestion that the 1939 balance sheet should show any pension liability in reduction of PTC's undistributed corporate surplus.

ment for funding of pension payments in the future. As a consequence, when PTC stockholders are burdened with those future pension payments, the payments must come first out of past earnings, then capital surplus and finally out of the capital stock account itself. The result here was to deprive PTC of all its past earnings, all its capital surplus and a substantial part of its capital, as was pointed out in the dissenting opinion of Mr. Justice Roberts of the Pennsylvania Supreme Court (concurred in by two of the other six justices).*

Proper accounting treatment of pension plans of public utility companies regulated as to rates is consistent with this analysis. Under applicable accounting principles such a company which has treated pensions on a pay-as-you-go basis may either omit the liability on its balance sheet, with an explanatory footnote, or, if it states the obligation as a liability, may reflect as an asset the right to receive the equivalent amount out of future revenues. The state courts said this testimony was not relevant. It did not require that the liability be set up on the balance sheet, but instead,

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* "Perhaps the most inequitable aspect of the Court's disposition is its saddling PTC with the obligation of paying future pension rights due its retired employees, thereby depriving PTC's stockholders of approximately $17,000,000. As a result the amount they will actually receive for their stock will be considerably less than the $10.00 per share envisioned by the 1939 formula. Indeed the amount required to meet the pension fund obligation is practically equal to the amount received in exchange for PTC's stock. Thus the effect of the disposition on this aspect is to wipe out entirely Item 3 of the option formula." 426 Pa. 377, at 410.

"Thus I believe the Court's treatment of the $17,000,000 pension obligation is doubly burdensome. First, it retroactively compels PTC to utilize past earnings in order to pay for future obligations. This is not only contrary to the manner which PTC, with the express approval of the City and the P. U. C., has in the past treated said obligations, but also contrary to the intent of the 1939 agreement itself." 426 Pa. at 414.

without foundation in the agreement, imposed the obligation on PTC and relieved SEPTA of responsibility.

The pension issue in this case is one which arises whenever a private public utility company whose rates are regulated is taken over by an authority. Acts creating such authorities often provide for the assumption of those liabilities by the authority and, in some cases, that the liability be taken into consideration in determining the value to be paid upon condemnation or acquisition.*

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* Many state statutes, including Pennsylvania's SEPTA Act, require state authorities to assume the pension obligations of public utilities when they are acquired by state authorities.

California	— Cal. Pub. Util. Code §§ 25054 (1965), 28853 (1965), 30753 (1965), 50123 (1965), 90351 (Supp. 1966), 95653 (Supp. 1966). Cal. Pub. Util. Code App. 3, § 13.93 (1965).
Connecticut	— Conn. Gen. Stat. Ann. ch. 103A, § 7-273(i) (Supp. 1966)
Delaware	— Del. Code Ann. tit. 19, § 802 (Supp. 1966)
Illinois	— Ill. Ann. Stat. tit. 111⅔, §§ 329 and 353.5 (Smith-Hurd 1966)
Indiana	— Ind. Stat. "Urban Mass Transportation Act of 1965" § 48-8823 (Burns Supp. 1967)
Iowa	— Iowa Code Ann. § 386B.15 (Supp. 1966)
Louisiana	— La. Rev. Stat. Ann. tit. 23, § 8906 (West. Supp. 1966)
Maine	— Maine Rev. Stat. Ann. tit. 30, § 4979 (Supp. 1967)
Maryland	— Md. Ann. Code art. 64B, § 14(1) (1961)
Ohio	— Ohio Code Ann. ch. 306, § 306.04 (Page Supp. 1966)
Pennsylvania	— Purdon Ann. Stat. Title 66, § 2025 (Supp. 1966)
Rhode Island	— R. I. Gen. Laws ch. 18, § 39-18-17 (Supp. 1966)
Washington	— Wash. Rev. Code Ann. § 35.58.265 (Supp. 1966)

In certain of the statutes referred to, specific provision is made for taking into consideration the pension obligation in fixing the value on condemnation or the price on acquisition, thus directly raising the

PTC's employees rely upon the security of the "fare box", and the Transport Workers Union in its brief to the Pennsylvania Supreme Court expressly said so.* The SEPTA Act attempted to provide this security. Section 8(f)(24)(.1)(iii) of the SEPTA Act (66 P. S. § 2008(f)(24)(.1)(iii) was intended to settle this problem by requiring that where a state authority condemned the entire assets (as here) or a substantial part thereof, of a mass transportation system, and

> "where it is contemplated that a substantial portion of the employees of such utility shall be transferred to and become employees of the authority,"

the authority must assume the liability under any pre-existing pension or retirement system with respect to both past and present employees. This same test was to apply in the case of a negotiated purchase. Nevertheless, SEPTA and the City sought to avoid any obligation to PTC's retired employees.

Where, as here, the regulated rates provide only for current payments of pensions on a pay-as-you-go basis and make no provision for funding of future payments, the element of retroactive denial of a fair rate of return is present. The difference between a regulated company and a normal manufacturing company in this respect is not gen-

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issue of retroactive denial of a fair rate of return. However, even in those cases where the statutes provide only for the assumption of future pension obligations, a question may arise as to the compensation to be paid.

* "[T]he fact is conceded—and this Court below has overlooked—that *the pensioners have heretofore had the security of the fare-box and that they are deprived of this security by the order of the Court below.* So long as the continuing employer, be it PTC or SEPTA, receives the operating revenue and is liable to pay existing and future pensions from those receipts, the pensions are secured and protected" [Brief for Amicus Curiae Transport Workers Union of America and Transport Workers Union of Philadelphia, Local 234, at page 9.]

erally understood. The result is great confusion and unfairness. The current trend for fostering regional transportation systems by use of federal grants makes this issue one of increasing pertinence and importance. Clarification of the law in this respect is, therefore, in the public interest, whether it relates to a condemnation or a negotiated purchase.

C. Condemnation Without Just Compensation Under the Guise of Exercising and Interpreting a Purchase Option, Pursuant to a Concert of Action Among State Instrumentalities, Violates Petitioners' Rights Under the Fourteenth Amendment.

No sensible person would ever have agreed to sell his property under a perpetual option which leaves him with nothing but liabilities as the reward for the successful development and profitable operation of his business. Yet that is what the state courts said the company did when it signed the 1939 agreement. Nothing in the agreement either justified or made this conclusion necessary. The courts reached this result by a series of arguments having no fair or substantial basis in the agreement or in state law.

The facts demonstrating the confiscatory nature of the purchase option as applied and construed here by the state courts have been sufficiently indicated for present purposes in the statement of Questions Presented (pp. 3-7, *supra*), the Statement (pp. 16-17, *supra*), and under points B. (pp. 22-27, *supra*) and D. (pp. 32-38, *infra*) hereof. There are, however, certain aspects of all this which deserve special emphasis here.

Where a state court decision on a question of state substantive law rests upon an inadequate or untenable state ground or does not have "fair support" under state law, this Court will not be swayed by such evasion in order to

avoid a federal ground subject to review in this Court. *Broad River Power Co. v. South Carolina,* 281 U. S. 537, 540-41, 543 (1930). In the present case the state trial court excluded all evidence of a fair valuation of petitioner's assets, asserting that such evidence was legally immaterial in interpreting the term "undistributed corporate surplus" as used in Section Eleventh of the 1939 Agreement (Appendix, p. 145-58a), because only balance sheet values were to be considered and then refused to consider expert accounting testimony as to the meaning of the phrase "undistributed corporate surplus" in its relation to the balance sheet, and in relation to the treatment of the pension liability in the case of a regulated company. By this means the trial court avoided any factual test as to the reasonableness of its interpretation or of the adequacy of the price formula and reached a conclusion that was wholly unreasonable. The question then is whether there was "fair support" for the trial court's ruling that "undistributed corporate surplus" meant only "Retained Earnings" on the Company's balance sheet, that it did not include "capital surplus" or any increase thereof because of appreciation in value and that it did not require SEPTA to assume PTC's liabilities.

At the time the 1939 Agreement was drafted the meaning of the term "surplus" had been interpreted by this Court in *Edwards v. Douglas,* 269 U. S. 204, 214 (1925), as follows:

> "The word 'surplus' is a term commonly employed in corporate finance and accounting to designate an account on corporate books. But this is not true of the words 'undivided profits.' The surplus account represents the net assets of a corporation in excess of all liabilities including its capital stock. This surplus may be 'paid-in surplus,' as where the stock is issued at a

> price above par. It may be 'earned surplus' as where it was derived wholly from undistributed profits. Or it may, among other things, represent the increase in valuation of land or other assets made upon a revaluation of the company's fixed property."

Accord, Branch v. Kaiser, 291 Pa. 543, 549, 140 Atl. 498 (1928).

The provision in the 1939 amendment with respect to "undistributed corporate surplus" was new as was the requirement that the purchase price include funded debt and that funded debt should be paid. Accordingly, the requirement that the assets be taken "subject to all indebtedness" (upon which the Court placed sole reliance), as had theretofore been true, was no longer apposite and the clause was eliminated. There was no change in the prior provision of paragraph Twelfth of the Agreement that the City was not to be liable for the "debts, obligations or liabilities" of PTC "unless and until" the option was exercised, or in the provision of paragraph Eleventh that the "entire transportation system" was to be purchased "as a whole."

On this state of facts, Judge Spaeth held that:

> 1. The phrase "surplus" was limited to "retained earnings":
>
> 2. Although the consideration was measured by surplus as so interpreted, liabilities are to remain with PTC even though by definition of this Court and the Pennsylvania Supreme Court, surplus meant "net assets of a corporation in excess of all liabilities."
>
> 3. No capital surplus was included, with the result that the capital resulting from reclassification of preferred stock into common stock was excluded. This was given no consideration.

The primary reasoning of Judge Spaeth is that it would have been advantageous to the City in 1939 to exclude any appreciation of assets in an option formula. His conclusion was derived, not from a careful reading of the language of the Agreement itself, which was obviously drafted by attorneys skilled in the intricacies of Pennsylvania corporate and public utilities law, but entirely from the informal statement of advocates urging adoption of the 1939 Agreement before a committee of the City Council (Appendix pp. 150-57a). This, however, does not explain why the City would use the phrase "undistributed corporate surplus" to mean "retained earnings," when it could easily have used "retained earnings." Mr. Justice Roberts termed the conclusion limiting undistributed corporate surplus to retained earnings a "non-sequitur", and said "I can see no justification for giving SEPTA the capital surplus as a windfall." (Appendix p. 39a).

Judge Spaeth's reasoning with respect to why "undistributed capital surplus" should be limited to retained earnings is set forth at pages 158-63a of Appendix D and is based on the belief that ". . . it appears that it was possible that PTC would have earned accumulated but unpaid dividends on preferred shares in an amount that would exceed the amount of "earned surplus" (or "retained earnings") at the end of a given year" (Appendix p. 161a). That is not so because earnings were accumulated on the preferred shares only if earned, and therefore, could not exceed earned surplus.

The absurdity of the construction that liabilities remain with PTC is illustrated by the fact that if it were to purchase properties on short term notes it would, under this interpretation, be responsible for the payment of the liabilities, but the property would be given to the purchaser without adjustment in the price.

The Court also stated that cash could be used to pay liabilities but if, as has been the case, the Company were to use its cash to purchase long-term debt the result might be to decrease the purchase price by the amount of funded debt and to deplete the fund from which the Court said liabilities might be paid. Mr. Justice Roberts, in his dissenting opinion stated that he was "disturbed by the uncertainty created by the Court's treatment of PTC's current cash and liabilities" and said:

> "In my view this confusion, which is not necessary and could produce a most inequitable result" should be clarified. (Appendix p. 39a).

In addition, after the declaratory judgment suit was instituted, the time for closing of the agreement was extended to a definite date in arm's length bargaining. Nevertheless the Court overrode this agreement of the parties and granted a "reasonable time, not less than six months" after the termination of the litigation. What the court did was to make a new agreement for the parties.

The SEPTA Act provided that the concept of fair value should apply in condemnation or in a negotiated purchase (See pp. 238a, 264-65a, *supra*). The entire Act was directed at the acquisition of PTC, as the trial judge understood. It is a fair inference that the legislature would not want to have PTC or its stockholders trampled upon, yet the Court permitted SEPTA, by obtaining an assignment of the contract from PTC, to avoid the provisions of the SEPTA Act requiring just compensation and the assumption of the pension obligations. This brings us to the question of whether a condition can be attached to such an agreement which can produce such unfair, whimsical and confiscatory results.

D. Enforcement by the State of an Unconstitutional Condition Denying Just Compensation for Petitioners' Property Raises Important Constitutional Issues Particularly in the Light of the Protection Given to Other Fundamental Rights.

The confiscatory result reached in this case does not, we believe, fall within the scope of those cases which have permitted a shading of constitutional standards where the condition exacted by a state or federal agency is in reasonable relationship to privileges or franchises granted and to the continued conduct of its regulatory functions.* SEPTA, a state agency seeking to exercise an option which it received only through assignment and for which it gave PTC no franchise or anything else, should not be permitted to enforce such a harsh and unreasonable condition.

The unreasonable nature of the condition involved here is best illustrated by the fact that the state courts have construed this to be a *perpetual* option and there is no pretense that the purchase price thereunder would ever have any relationship to fair value.** Instead, the result is clearly confiscatory. The option contract as interpreted was no less than a compelled "waiver" of PTC's constitutional right to due process and just compensation.

There is growing recognition that governmental powers may not be exercised to impose conditions which require

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* See *Fox River Paper Company v. Railroad Commission of Wisconsin*, 274 U. S. 651 (1927); *United States v. Appalachian Electric Power Co.*, 311 U. S. 377 (1940).

** In *Railroad Commission v. Los Angeles R. Corp.*, 280 U. S. 145, 151 (1929), this Court stated that "It is possible for a state to authorize a municipal corporation [here the City] by agreement to establish public service rates and thereby *to suspend for a term of years not grossly excessive* the exertion of governmental power by legislative action to fix just compensation to be paid for service furnished by public utilities." [Emphasis added.]

the relinquishment of constitutional rights, that is, unconstitutional conditions. See *Frost v. Railroad Commission,* 271 U. S. 583 (1926); *United States v. Chicago, M., St. P. & P. R. R.,* 282 U. S. 311 (1931); *Fowler v. Rhode Island,* 345 U. S. 67 (1953); *Speiser v. Randall,* 357 U. S. 513, 518-19 (1958); *Sherbert v. Verner,* 374 U. S. 398, 404-6 (1963); and *Thorpe v. Housing Authority,* 386 U. S. 670, 678 (1967) (Douglas, J., concurring). See also *Hague v. C. I. O.,* 307 U. S. 496, 514-16 (1939) and *Jamison v. Texas,* 318 U. S. 413, 415-16 (1943). See generally, Note, *Unconstitutional Conditions,* 73 Harv. L. Rev. 1595 (1960).

In *Hague, Jamison, Fowler,* and *Speiser,* this Court did not hesitate to strike down unconstitutional conditions violating personal freedoms and liberties protected by the First and Fourteenth Amendments.

The fact that the state or federal government may have a contract right is not a sufficient justification. Thus in *Thorpe v. Housing Authority,* 386 U. S. 670, 678 (1967), the Authority availed itself of a lease provision to terminate a tenant's lease. Although no reason was given for the termination, the notice was given the day after the tenant had participated in a tenants' protective meeting. Since the Authority later changed its rules to require advice to the tenant of the reason for termination in such circumstances, the per curiam order of this Court did not reach the constitutional issue. Mr. Justice Douglas, in his concurring opinion, stated:

> "It is not dispositive to maintain that a private landlord might terminate a lease at his pleasure. For this is government we are dealing with, and the actions of government are circumscribed by the Bill of Rights and the Fourteenth Amendment. 'The government as landlord is still the government. It must not act arbitrarily, for unlike private landlords, it is subject to the requirements of due process of law. . . .'"

He further said:

> "In *United States v. Chicago, M., St. P. & P. R. R.*, 282 U. S. 311, the Court said that 'the right to continue the exercise of a privilege granted by the state cannot be made to depend upon the grantee's submission to a condition prescribed by the state which is hostile to the provision of the federal constitution.' This was in the tradition of *Frost Trucking Co. v. Railroad Comm'n*, 271 U. S. 583, 594, where the Court emphasized that 'If the state may compel the surrender of one constitutional right as a condition of its favor, it may in like manner, compel a surrender of all. It is inconceivable that guarantees embodied in the Constitution of the United States may thus be manipulated out of existence.' "

The Court in *Frost* in enunciating the basic principle relating to unconstitutional conditions made the following specific reference to the general rule relating to the grant of a privilege upon conditions:

> "It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited, and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. 271 U. S. at 593-4.

Personal freedoms are bound together in innumerable ways. See *Shelley v. Kraemer*, 334 U. S. 1, 10 (1948). It is no accident that the same clause of the Fourteenth Amendment provides in close sequence that a state shall not "deprive any person of life, liberty, or property; nor deny to any person within its jurisdiction the equal pro-

tection of the laws." The right to just compensation is a substantial right deserving full constitutional protection. If a state can retain a string on a man's property which enables it to confiscate it at will, the state can destroy him and his ambitions to raise his standards, to educate his children and to improve his condition in life. Personal and property rights are basic freedoms in America, unlike the situation in some other countries.

PTC has 14,000 stockholders residing throughout the United States. A large number of them each have modest holdings of PTC's stock. They include many present and former employees of the Company and members of their families who look upon their holdings as important assets. The net amount of any purchase price received by PTC from SEPTA will have a direct and immediate impact upon the stockholders and their personal lives.

The right of purchase retained by the City in a changed form in 1939 was a by-product of the need for obtaining the City's consent to modification of the prior contract of 1907. SEPTA's contention that the presence of a contract eliminates any constitutional question does not meet the issue as to the unconstitutional condition included in the contract. Neither *Fox River Paper Company v. Railroad Commission,* 274 U. S. 651 (1927), nor *United States v. Appalachian Electric Power Co.,* 311 U. S. 377 (1940) justifies this position. Neither of those cases involved the question of the valuation to be placed upon the physical assets of the company concerned. The sole question was the value to be placed on water power rights in which the courts held the company had no property right.*

There is no relation between the option as interpreted and values attributable to the grant by the City of any

* The same was true in *United States v. Rands,* — U.S. — (1967), 36 U.S. Law Week 4012, with respect to port rights.

franchise or privilege of a governmental nature. PTC has made no claim in these proceedings for values based upon franchises or other such intangibles. Instead, it seeks only to obtain a fair purchase price for the actual value of the properties which it owns and which do not flow from any grant of a privilege or franchise by the City.*

This petition for certiorari raises the very important constitutional question as to whether and, if so, to what extent and under what limited circumstances, a state shall be permitted, under the constitutional view of the Fourteenth Amendment today, to impose and enforce an unconstitutional condition which will deprive a person of *property* without due process of law.

E. The Due Process Clause of the Fourteenth Amendment to the Constitution of the United States Prohibits State Agencies From Dealing Unfairly With a Private Corporation to Secure an Agreement Under Which Its Property May Be Taken Without Just Compensation.

Petitioners Janney, et al., intervening stockholders, have contended since the outset of this litigation that neither PTC nor the City intended that the 1965 extension Agreement would serve as a basis for the transfer of the City's purchase-option rights to SEPTA.** Furthermore, the

* Since prior to 1939 the City has not had the power to grant franchises for public transportation in the streets of Philadelphia and the bulk of PTC's operating rights have stemmed from the Pennsylvania Public Utility Commission (not the City) and from independent leases and agreements with the City under which PTC makes separately specified payments.

** The City knew that PTC thought it was doing the City a favor by extending, for a short time, the Broad Street Subway lease agreement, and that part of the 1962 extension agreement by which PTC was obligated to pay the City the sum of $560,000 per year for the privilege of using the City's streets. Since PTC considered both the subway rental of $900,000 per year and the license fee of $560,000 per year to be grossly excessive, PTC had absolutely nothing to gain

City had given PTC every reason to believe that the City was disinterested in its purchase-option rights.*

Under the circumstances, the principles of fair play embodied in the due process clause of the Fourteenth Amendment to the Constitution of the United States required the City to give PTC notice when it came to the decision to grant SEPTA's request to assign the purchase option to SEPTA and that it would use the 1965 agreement to support the validity of SEPTA's right to purchase PTC's property under the option. If PTC had received such notice it could have, and undoubtedly would have, withdrawn its consent to the Agreement. The City gave no such notice. Instead, it kept possession of its draft of the Agreement, already signed by PTC, and waited until Mayor Tate's return on February 25, 1965. The Agreement was executed by the City and immediately put before City Council as the basis for enactment of an ordinance authorizing the executive officers of the City to assign the option to SEPTA.

After the instant action was commenced, the City changed its position by arguing the assignment to SEPTA could be upheld on the theory that the City's purchase option under the 1907 Agreement was intended to be perpetual. This argument was a mere afterthought. This

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by agreeing to the six-month extension. The City wanted and requested a two-and-one-half-year extension. Under these circumstances it can only be supposed that PTC intended the 1965 Agreement to serve as a temporary, or stop-gap, accommodation, and certainly not as an extension of the City's expiring purchase-option rights to acquire PTC's property by paying only a very small fraction of the actual value of that property.

* The mayor assumed that PTC and SEPTA would reach an agreement of purchase, and he assured PTC, in effect, that the City would not become involved in the PTC-SEPTA negotiations. (See, for example, the exchange of letters between the City's Mayor, Mr. Tate, and PTC's Director, Mr. McShain, Appendix pp. 308-10a).

is demonstrated by a number of circumstances,* the most important of which is that the Supreme Court of Pennsylvania previously held to the contrary in a 1960 declaratory judgment action between the City and PTC. In that case the Supreme Court of Pennsylvania said:

> "On July 1, 1907, the City and the Philadelphia Rapid Transit Company, of which PTC is now the successor, entered into a written agreement which, by a later *extension,* remains effective until July 1, 1962. The City is granted an option to purchase on the first of July of any year, *while the agreement is in force,* all the leaseholds, franchises, real and personal property of PTC and its wholly owned subsidiaries." *Philadelphia v. Philadelphia Transportation Company,* 304 Pa. 282, 283-4 (1961).

Having once decided that the agreement must be kept effective by amendatory agreements, the state courts cannot avoid the federal questions raised in this case by now holding, to the contrary, that the agreement is perpetual.

All of these facts show that the decrees of the state courts were necessarily based in large part on the 1965 agreement and that this agreement was procured unfairly by the City to support SEPTA's purchase of PTC's property under the option for a fraction of its value. This Court should consider whether state agencies can profit from such unfairness.

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* (1) The City's ordinance authorizing assignment of its rights to SEPTA, the assignment itself, and the complaint jointly filed in the case, by the City and SEPTA, for the purpose of enforcing the assignment, were all expressly based on the 1907 agreement as amended by the 1965 agreement.

(2) The chronology shows that the City and SEPTA hurried to complete the assignment and to commence the suit before the expiration of the 1965 Agreement on June 30, 1965.

CONCLUSION.

The final result of the state court's decision is to give PTC nothing. This is because the imposition of the burden for future pensions presents PTC with an insoluble problem. The cost of funding future pension payments is merely an estimate as is the adequacy of the Company's reserve for injuries and damages. These estimates change from time to time as life expectancies and jury verdicts increase. What it comes down to is that PTC can never safely make any distribution to its stockholders. The result is not that PTC's stockholders will receive a maximum of $4.5 million but that, in fact, they will receive nothing at all.

As the trial court's historical recital shows, it is opposed to privately owned mass transportation and, as its decision shows, it is in favor of public ownership of PTC's property. However laudable the motivation may be to develop a publicly-owned transportation system, there is no way to circumvent the constitutional requirement of paying for the change. The state courts here have attempted such a short cut by giving PTC's property to SEPTA without any compensation to PTC's stockholders.

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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